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No. 91 1221

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

UNITED STATES OF AMERICA, Petitioner

v.

STEPHAN G. KOONCE

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SUPREME COURT, U.S.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Stephan G. Koonce opposes the petition of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. Mr. Koonce petitions for a writ of certiorari to review other aspects of the judgment in a cross-petition filed concurrently.

Mr. Koonce believes that the United States has accurately set forth the opinions below, the statement of jurisdiction, the Constitutional provision involved and the factual statement, except Mr. Koonce believes that the cases cited in footnote 7 to the factual statement do not require a result different than that reached by the court of appeals.

Mr. Koonce also agrees that the court of appeals has decided an important question of constitutional law. He does not agree that the decision of the court of appeals, as it relates to the issue the United States raises, conflicts with decisions of this Court or other courts of appeal.

The United States argues that the court of appeals erred by holding that conduct considered for sentencing purposes cannot serve as the basis for a subsequent prosecution. This misstates the decision of the court of appeals. The court of appeals reasoned that Congress intended to implement a "real offense" approach to drug crimes. This approach requires that an accused be punished for "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction."

U.S.S.G. § 1B1.3(a)(2). Once these acts and omissions have been aggregated and a defendant has been punished based on the conduct, he may not be punished for the conduct again, absent specific evidence that Congress intended a second punishment.

The court of appeals then examined the intent of Congress, and concluded that "there is no evidence that Congress intended that an individual who distributes a controlled substance should receive punishment both from an increase in the offense level under the Guidelines in one proceeding and from a conviction and sentence based on the same conduct in a separate proceeding." See App. to Petition of the United States for a Writ of Certiorari to the United States Court of Appeals to the Tenth Circuit, 11a.

This holding, as opposed to the straw-man holding set up by the United States, is not inconsistent with this Court's decision in Williams v. Oklahoma, 358 U.S. 576 (1959). In Williams the defendant pleaded guilty to murder and was sentenced to life imprisonment. In a subsequent prosecution he pleaded guilty to kidnaping and was sentenced to death. In imposing the death sentence, the court considered the murder as an aggravating factor. Williams relies on the premise that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment." Id. at 585.

Today, it is precisely that belief which prevails. The sentencing guidelines establish legal categories for

offenses and assign narrow ranges of punishment for each category. The court of appeals noted that the guidelines require grouping of counts which are based on the quantity of a substance involved, such as narcotics cases. See U.S.S.G. § 3D1.2(b) and (d). After the counts are grouped, "the offense level applicable to a Group is the offense level corresponding to the aggregated quantity. . . ." Id.

The United States also asserts that the decision of the court of appeals conflicts with the decisions of other courts of appeal. The court of appeals considered the decisions cited by the United States and concluded that they were distinguishable because none involved punishment for conduct that was previously aggregated into a defendant's base offense level for a related crime. Because the Guidelines aggregate fungible offenses and provide punishment for them in one proceeding, the court of appeals reasoned, Congress intended to prevent double punishment.

Finally, the United States argues that the decision of the court of appeals could have serious adverse consequences for prosecutors. To the contrary, the decision of the court of appeals merely implements the intent of Congress. The United States fears that an individual could be indicted on a relatively minor charge with a small maximum sentence. If the district court increased the base level of the offense for uncharged conduct, the government would then be precluded from subsequently convicting and punishing the individual.

This is the result Congress intended. The Guidelines are intended in part to prevent "charge manipulation" by prosecutors. The Introductory Commentary to U.S.S.G. § 3 part D says that "[t]he most serious offense is used as a starting point." It also states:

> In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this Part provides rules for grouping offenses together.

Were the Guidelines to be read as the United States urges, prosecutors could choose to charge only for conduct that is relatively insignificant, but easy to prove, then tack on more significant conduct at the sentencing phase and finally charge again for the more significant conduct.

Unless Congress intended to punish Mr. Koonce twice for the distribution of methamphetamines, the Double Jeopardy Clause precludes the United States from doing so. The Guidelines provide a clear system for aggregating related conduct and punishing it. The court of appeals properly applied those Guidelines and this Court need not review its decision.